

No. 10,823

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

PIERRE BERCUt and JEAN BERCUt, Individually and as Copartners doing business as P & J CELLARS (a Copartnership),

Appellants,

vs.

PARK, BENZIGER & Co., Inc. (a Corporation),

Appellee,

and

PARK, BENZIGER & Co., Inc. (a Corporation),

Cross-Appellant,

vs.

PIERRE BERCUt and JEAN BERCUt, Individually and as Copartners doing business as P & J CELLARS (a Copartnership),

Cross-Appellees.

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

May it please the Court:

At appellee's page 3 we are loosely charged with "irresponsible misstatements", set forth in their Appendix A. Our reply in our Appendix A hereto demonstrates that there is neither irresponsibility nor misstatement.

The "impression" at their page 3 about "inexperienced innocents" misses the point of the evidence, which was simply offered to show that the sellers were not wine merchants, but simply in the course of other activities entered fortuitously into the wine storage transaction detailed at our Opening pages 10 and 11, in an effort to make use of some idle space in a cold storage warehouse.

We follow the sequence of appellee's brief in our reply to it:

Appellee's pages 4 to 12: We agree that the case falls under Calif. Civil Code § 1787, and in our Opening we argued from that premise. We agree that it does not come under subsection (3) and that it does come under (2), because there was not "an available market". However, that true premise is broadened by appellee at its pages 6 and 7 into a false premise by crossing over into the market unavailability basic to subsection (2) the "special circumstances" connected expressly and solely with market availability under subsection (3); and then appellee's crossover is made pregnant with worse confusion on the way over by the innuendo at their page 6 that the "special circumstances" connected with market availability under (3) means "loss of profits upon a specific resale contract". That innuendo is utterly without any support in the law. Appellee cites no case, and we believe that none can be cited, in support of the proposition that when the goods are available in the market the buyer may nevertheless

collect loss of expected profits on resale. He may not; the proper measure in a case of availability is the excess of market price over contract price, "because the purchaser having the money in his hands may go into the market and buy", *Williston, Sales*, § 599; 46 *Am. Jur.* 803. The "special circumstances" stated in subsection (3) have the meaning illustrated in the following passage in *Williston, Sales*, § 599:

"It may be that no market exists at the place where delivery was due. The nearest available market furnishes the basis under such circumstances; the expense of obtaining and transporting the goods from that market to the place where delivery is due being added. It will not infrequently happen that goods have no market value or none which can be determined with any exactness. Wherever goods are of a special kind or are of a peculiarly good or bad grade or quality, this is likely to occur. In such a case the court must determine the value of the goods as best it can by considering the expense to the buyer of securing similar goods, or goods which would equally well serve the purpose."

Loss of expected profits, i.e., gain prevented, because of unavailability of the goods elsewhere in the market must, under subsection (2), be shown to be a "loss directly and naturally*" resulting in the ordinary course of events, from the seller's breach of contract", and it is not such a loss if at the time the contract was entered into the seller did not know that other goods of the kind contracted for could not be obtained by the buyer. There is no conflict, contradiction or inconsistency between the authorities cited in our

*The term "naturally" comes from the text of Baron Alderson's statement in *Hadley v. Baxendale*, where he defined it as meaning "according to the usual course of things". And see *Williston, Contracts*, § 1356.

Opening pages 39 to 53 and the cases cited by appellee, for in none of the latter was the question at bar discussed, and not one of them cites or discusses the Sales Act. On the contrary, *Marcus & Co. v. K. L. G. Baking Co.*, 3 Atl. 2d 627, decided nineteen years after appellee's principal case of *Orester v. Dayton Rubber Mfg. Co.*, 126 N.E. 510, cites and fully discusses the Sales Act.

Pages 12 and 13: We are charged with miscopying *Williston, Contracts*, § 1347. We did *not* miscopy. At our Opening page 47 we said that "in that section Williston said, 'When a defendant has been notified,' " etc. That is exactly what Williston said, and our quotation of him is a true one. The revised edition of his Contracts was written by Thompson who changed the words to, "When a defendant has reason to know", etc. Under either text our motion for a directed verdict was good. Appellee simply makes a loose and unfounded charge of misquotation in an effort to bolster a bad argument, the argument being bad because it in turn is a loose and unfounded assertion, at their page 12, that "the defendants had reason to know of the condition of the wine market". The relevant time of knowledge is the day, January 29, 1943, when the contract was entered into, and the evidence spread at our Opening pages 10 and 11 is positive, clear, uncontradicted, and credible, that at that time the Bercuts were ignorant of the fact that if they therefore breached the contract other wine would not be obtainable in the market. The testimony is clear, and the astute trial counsel of appellee carefully refrained from cross-examining either of the Bercuts about it, no doubt because his witness Hermann had already admitted on cross-examination that when the contract was entered into he, Hermann, knew that the Bercuts were novices in the wine business. (See our Opening page 9.)

To sustain a verdict, appellee should have destroyed our evidence by cross-examination or opposing evidence, rather than by loose words in a lawyer's brief. Their present loose talk does not create an opposing presumption against the evidence, and even if it did the presumption would fall before the uncontradicted testimony of even a party to the cause, *Ariasi v. Orient Ins. Co.*, 9 Cir., 50 F. 2d 548, where it is laid down that "in the absence of all contradictory evidence and any inherent improbability in the testimony, the Court cannot arbitrarily reject the testimony of a witness whose testimony appears credible". (50 F. 2d at 551, col. 2.) Appellee's sole citation is to *Spore v. Washington*, 96 Cal. App. 345, 274 Pac. 407, which was a suit for damages for personal injuries arising from a defect in the premises of a building against a defendant who breached a duty to inspect for defects, a field utterly foreign to the present issue before the Court. Where, in the law of Sales, can one find a ruling that a seller is under a *duty to investigate* availability of the goods elsewhere at some future date, before entering into a contract of sale?

Pages 14, 15 and 16: Appellee cites as the "Governing Law" the two local cases of *Natural Soda Products Co. v. Los Angeles*, 23 Cal. 2d 193, and *Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co.*, 17 Cal. App. 2d 265. Very well, let the Law of those cases Govern the one at bar. It is laid down in the latter, 17 Cal. App. 2d at 267, that the *requirement* of the law is "that the best evidence be adduced of which the nature of the case is capable". In both of the cited cases the plaintiffs carefully accepted and met that test. In the *Hacker* case the plaintiff jobber proved the actual sales made by itself during the life of the contract, and its actual profit experience thereunder, and applied that profit experience as a proved test of the

additional profit it would have made in its established business upon the additional volume sold during the same period of time in its exclusive territory by defendant in violation of the exclusive right of the plaintiff. Similarly, in the *Natural Soda Products Company* case, the plaintiff had operated its first or older plant for five years before the tort flooded the second or new plant for processing the identical natural chemical compound; and the plaintiff accepted and met the requirement that lost profits be proved by the *best* evidence, by proving (23 Cal. 2d at 199-200): actual sales in the two years preceding the tort; that prices were stable; unit costs based upon "detailed figures concerning actual expenses, such as labor, depreciation, insurance, taxes, and royalties"; and proved capacity of plant.

Those two cases are *against* appellee; they strongly support the defense motion for a directed verdict. At bar, appellee offered only the poorest evidence, not the best.

Pages 16 to 19: Appellee's assertion that all our citations are "bad law" is based upon the assumption that a revolution was worked in California law by the *Natural Soda Products Company* case, *supra*, which simply held that the particular evidence was satisfactory and sufficient. The assumption of revolutionary law is unfounded. The case lays down no new law and is perfectly consistent with the California cases cited in our Opening. The cases in which an award has been sustained are those wherein the proof (1) has been based upon profit *experience* of the particular claimant, thus providing a satisfactory basis of reasonable estimate, and (2) the evidence of that experience has been the *best* evidence of which the case permits.

The required *experience* is an "operating experience sufficient to permit a reasonable estimate of probable in-

come and expense", *Natural Soda Products Co.* case, 23 Cal. 2d at 199, which is of course lacking in the case of a new enterprise or business not yet launched, i.e., there are no provable data furnished by actual operating experience; and the requisite operating experience is equally lacking if an established business adds a new or unestablished line of goods, *Thrift Wholesale Inc. v. Malkinillion Corp.*, 50 F. Supp. 998, at 1000, col. 2.

The requirement of the *best* evidence of provable data based on experience is not met by the loose percentage estimate of the interested Elman: "Litigants cannot be permitted to estimate the money out of the coffers of their opponents in this reckless way", *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 102.

Pages 19 to 23: Appellee says at his page 20 that four named witnesses testified to facts that proved that all of the tens of thousands of cases of wine could have been sold at the "list prices". There is not a scintilla of evidence that so much as one case of wine was ever sold at those prices; and those witnesses merely testified in substance to a strong demand and a rising market. After the publication of the list, and separately from the contract sued upon, appellee bought at least 2500 cases of other California wine from appellant (R. 88), but made no proof, detailed or otherwise, of its resale prices or selling expense or profit experience, although the evidence must have been readily available in its books of account, nor any proof of experience with the eight or nine or ten thousand cases of California wine (see our Opening pages 24 and 25) obtained from others in California in 1942, the very period as to which their witnesses testified to a strong market. See the ninth ground of our motion for a directed verdict, R. 467, that appellee "instead of turning to better evi-

dence has used worse or poor evidence by way of opinion or estimate or guesswork". Whether rising, stable or falling market, appellee had better evidence, the best evidence, hidden away unused in its books of account, covering its own transactions in California wine to the extent of thousands of cases during the market period in question.

At its page 22 appellee seeks to avoid the requirement of the established rule that any award for gain prevented must be based upon provable data furnished by *experience* by arguing, in effect, that it was a business house that throughout all previous years was inexperienced in commodity shortages; it says that "plaintiff's past profits were before the shortage". There is not a scintilla of evidence in the record as to what profits appellee ever made in any year or at any time, but the proof is confined to the loose, vague and general statement about a single item that its wine sales manager called "overhead". The truth is that what appellee is seeking in that argument at page 22 to do is to attempt to sustain an award based on the highly inflated prices stated in its posted lists for the months of March and April, 1943, and without regard to the effort that has been made by the Congress and the price agency created by it to stop or control inflation and place a limit or *ceiling* on permitted prices. In the last analysis that argument on page 22 is simply an effort by circumlocution to ignore, and to invite this Court to ignore, the O.P.A. ceiling.

Pages 23 to 27: Appellee fails to point to any evidence as to cost of washing and polishing the bottles. And there is no basis for the naked assumption at their page 26 that "the cost of printing labels was part of the regular overhead". Labels are part of the production of the container of packaged goods, and their cost is a production cost.

Similarly, interest, "the cost of capital", is never included in "overhead". Overhead "may be said to include broadly the continuous expenses of a business, irrespective of the outlay on particular contracts", 46 C.J. 1161.

Pages 29 and 30: The curious argument is made, "O.P.A. Limitation Outside of Issues Because Not Pleaded". The mention of "illegality" in Rule 8(c) FRCP relates to illegality in the contract sued upon in the "preceding pleading", not to an illegal excess in the amount of prevented gain attempted to be proved by a plaintiff for breach of a legal contract. *Shelley v. Hart*, 112 Cal. App. 231, 242-243, 297 Pac. 82, 87.

Pages 30 to 38: In these pages the appellee deliberately attempts to confuse and mislead. The trial theory was this: the appellee was suing upon an alleged repudiation occurring on April 27, 1943, and attempted to make proof of *market value* subsequent to that date. Market value was relevant only if there was a market, i.e., if the wine was available elsewhere; and there was none available. Even if available in the market, then under California law the inquiry into market value would be confined to the day, April 27, 1943. (See Defense Request No. 22, R. 50 and 51, and comment at R. 493.) Appellee's attempt to prove market value took the form of an attempt to prove the prices at which appellant subsequently sold the wine to others over a period of months. The portions of the record, R. 255-261, quoted at appellee's pages 31, 32 and 33, occurred in the course of appellee's attempt to lay damages on the excess of market value over the contract price, notwithstanding there was no available market. Thereafter, at R. 297, appellee recalled Elman as a witness and changed its own trial theory from R. 298 onward. Under appellee's changed theory appellants made no attempt to

confine proof to the day, April 27, 1943, because appellee's new theory went for loss of profits, i.e., gain prevented *after* April 27, 1943, through the life of the contract. Under that changed trial theory of appellee, any matter that had occurred before April 27, 1943, or that thereafter occurred up to the time of the trial, that would furnish provable data of profit experience or that would have a relevant bearing thereon, would be admissible; and at no time during the trial did we ever object to the offer of such data, nor indeed would it ever have occurred to us to have made an objection to such an offer, in view of the well known rule long established in California in the leading case of *Shoemaker v. Acker*, 116 Cal. 239, where at 247 the rule was stated as follows:

“This rendered the offered evidence more valuable; for in an action upon a contract which contemplates a long period of time for performance, if the trial be delayed, the conditions existing at the time of the trial, as affecting the prospective profits, may be shown. In such a case ‘parties are entitled to the benefit of any facts transpiring subsequently to the bringing of the action which show more clearly the gains prevented by the breach complained of, or the damages sustained from such a cause of action, or any other, the injurious effects of which extended into the future.’ (Sutherland on Damages, sec. 107. See also, *Tahoe Ice Co. v. Union Ice Co.* [109 Cal. 242], *supra*.)”

Pages 40 to 42: To understand appellee's argument about Price Regulations, a brief statement is needed. The first of the price regulations during the present war became effective on May 11, 1942, and was known as the General Maximum Price Regulation (GMPR). It used the base-period method of pricing, and the base-period used was March, 1942. In § 1499.2 maximum prices were stated as follows:

“§ 1499.2. *Maximum prices for commodities and services; general provisions.* Except as otherwise provided in this regulation, the ‘seller’s’ maximum price for any commodity or service shall be:

(a) The highest price charged by the seller during March, 1942:

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it; or

(b) If the seller’s maximum price cannot be determined under paragraph (a), the highest price charged during March, 1942, by the ‘most closely competitive seller of the same class’:

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it.”

It was stated at page 33 of the Fourth Quarterly Report of the Office of Price Administration, for the period ended January 31, 1943, that:

“When the General Maximum Price Regulation was issued in May, 1942, fixing the prices of thousands of commodities at the highest price charged by the seller during the previous March, it was realized that this method of a general price freeze could hardly provide a permanent solution to the problem of controlling all the items covered by the regulation. It was found necessary to move many commodities out of the GMPR as rapidly as possible.”

On August 9, 1943, brewery, distillery and winery products were moved out of the GMPR by MPR 445, effective August 14, 1943. In that movement of those products from

the one regulation to the other, the technique of price control of those commodities was changed from the base-period technique to the cost-plus pricing technique. In our Opening pages 67 and 68 we give detailed reference to the contents of MPR 445, showing that it imposed a ceiling markup of 25% over defined net cost, and that that ceiling applied to appellee as a "wholesaler" as defined in MPR 445, being a person engaged in the business of buying and selling wine, without changing the form thereof, to persons other than consumers. The "definitions" in MPR 445 are contained in § 7.12 thereof, and the definition of a "processor" is therein given as follows:

"Processor' means any person who:

- (i) Produces or blends distilled spirits or wine, including (but not limited to) a distiller, rectifier or vintner; or who
- (ii) Bottles under any brand name distilled spirits or wine belonging to him, or who
- (iii) Causes distilled spirits or wine to be bottled or blended for his account under his own brand name."

The definition of "wholesaler" is therein given as follows:

"Wholesaler' means any person (except a monopoly state or primary distributing agent) engaged in the business of buying and selling distilled spirits and/or wine without changing the form thereof, to persons other than consumers."

In our Opening we asserted that appellee is a wholesaler. At its pages 40 to 42 appellee asserts that it is a processor. If a wholesaler, it came under MPR 445. If a processor, it was excluded under § 4.1, i.e., processors were left under the GMPR.

Contrasting the foregoing definitions of "processor" and "wholesaler" it will be seen that the test is, Did appellee change the form of the wine? With respect to the 60,000 cases mentioned in the contract we are not concerned with the 33,309 cases not yet bottled or in existence, but are concerned only with the 26,691 cases *already bottled*, because it was only the latter wine that was submitted to the jury as a basis for their verdict. As to the 26,691 cases, appellee did not change the form thereof from bulk to bottled wine, because it had already been in bottled form for some years when the contract was entered into in January, 1943. Appellee did not produce or blend the wine, because it had already been produced, blended and bottled for some years. Appellee did not bottle "under any brand name distilled spirits or wine belonging to him", because the bottling had been completed some years before the contract was entered into in January, 1943, at a time when the wine not only did not belong to appellee, but appellee was even ignorant of its existence. Nor did appellee cause "wine to be bottled or blended for his account under his own brand name", because the wine had been bottled and blended by appellants for their own account years before they ever heard of the existence of appellee. At its page 41 appellee premises its argument with the innuendo that bottling and labeling are identical. It is self-evident that bottling wine is one thing, labeling it is another. It is not to be supposed that a wine wholesaler can at his own caprice take himself out from under MPR 445 merely by using a rubber stamp or a print shop upon the exterior of bottles of wine, produced, blended and bottled by someone else for the latter's account, but that is all that appellee's label argument amounts to.

Pages 42 to 44: Appellee argues that under § 5.10 of MPR 445 it could sell and continue to sell wine at the prices stated in the wholesale and retail price lists posted with the New York State Liquor Authority, Plaintiff's Exhibits 14 and 15, R. 308-311 and R. 316-318. MPR 445 § 5.10 reads as follows:

“Dates on which This Article [Article V—Maximum Prices for Sales of Packaged Distilled Spirits and Packaged Wine by Wholesalers, Retailers, Monopoly States and Primary Distributing Agents] shall apply. This Article, except as otherwise provided, shall apply to all sales or offers to sell of packaged imported or domestic distilled spirits or wine made by a wholesaler, retailer, monopoly state, or primarily distributing agent on and after August 31, 1943; *Provided*, That this Article shall not apply to any sale which a wholesaler, retailer or primary distributing agent is required by statute, ordinance, or regulation to make at a price posted or listed prior to August 14, 1943, with a state or other public authority (if the price so posted or listed is greater or less than that established by this Article for such sale) until on and after the first effective date for prices so posted and listed at the first opportunity after August 19, 1943.”

Under that exclusion of list prices under a required sale pursuant to a listing, it is self-evident that it relates only to a list that was in effect on August 14, 1943. Neither Exhibit 14, Schedule of Wine Prices to Retailers, nor Exhibit 15, Schedule of Wine Prices to Wholesalers, was in effect on August 14, 1943, nor was either one of them in effect subsequently to the month of May, 1943. Each of the exhibits states at the beginning that it was filed in New York, “pursuant to § 101-B of the Alcoholic Beverage Control Law”. We reprint that New York statute here as Appendix B and the merest of glances at

the text of it will at once demonstrate (1) that the purpose of it is simply to prohibit liquor dealers from price discrimination between customers by favoring one and disfavoring another through the medium of rebates, discounts and the like, and (2) each list thus filed or posted had an effective life of only one month, i.e., had to be filed or posted once a month. The retail list, Exhibit 14, R. 308, is headed, "Effective for the Month of March, 1943", and at the foot of R. 309 is corrected to read "Month of April, 1943". That list was therefore no longer in effect after the month of April, 1943. The wholesale list, Exhibit 15, R. 316, is headed, "Effective for the Month of May, 1943", and at the foot of R. 317 reads, "This Schedule of Prices to Wholesalers for Month of May, 1943". Elman admitted on his cross-examination that a new list had to be made up "on that kind of a form" each month, R. 324, and that the Bercut wines were "deleted" from the lists filed by appellee subsequent to the month of May, R. 325.

It is clearly obvious that appellee does not escape the 25% markup ceiling by the proviso in § 5.10 of MPR 445. Even if appellee had posted or listed a price effective in August, 1943, it would not escape the ceiling of MPR 445 for all time, but the proviso of § 5.10 would merely have enabled it to complete the month of August, 1943, until the life of the list had ended.

Pages 44 and 45: Appellee says that MPR 445 "obviously did not affect sales made before its enactment". The short answer is that appellee made no sales before August 14, 1943, with the possible exception of one minimum carload of 1200 cases and even as to that sale the record does not show the terms or price of sale. The case was not submitted to the jury on the theory that appellee now attempts to put forward. The whole theory of appellee's

case in the form in which it went to the jury was a theory of spot sales from month to month at wholesale and retail in the ordinary course of business and it was on that theory that it asked that its gain prevented be calculated, and it was upon that theory that the jury calculated the amount of the verdict under attack. Appellee at its page 44 seeks to piece out a bad argument by the statement that "the damages in the present case" were "taken as fixed on April 27, 1943". That is an untrue and misleading statement. For the purpose of calculating damages, the date of April 27, 1943, was material during the trial only during the course of appellee's attempt to prove an excess of market value over the contract price. After the Court below ruled out market value, appellee changed its damage theory to one of lost profits, R. 298 (Elman recalled), and from that point on, the date of April 27, 1943, lost the significance it had theretofore had during the trial.

Pages 45 and 46: These pages are merely a repetitive form of a preceding argument.

Pages 46-49: If there be any merit in the contention that our request was bad because oral, it is a contention that should have been made to the Court below. If a trial Court is willing to accept an oral request, and does not reject it because it is oral, that should be the end of the matter. However, the request could only be oral because it related to a matter that sprang up from within the jury after it had retired. Moreover, the jury were not asking for a further instruction but simply sent a note to the judge saying, "Please get us copy of OPA price regulation on retail and wholesale prices effective sometime during August, 1943", R. 526. The jury were asking for a paper, a document; they were seeking to learn a fact, i.e., What was the price ceiling effective in August, 1943? It so

happened that the "price regulation" of which they asked for a copy was something that under the law was within the judicial knowledge of the trial Court and the request was merely, in substance, that the trial Court tell the jury what it judicially knew, i.e., that the ceiling was a markup of 25%. The suggestion at appellee's page 49 that the response by the Court below to the jury request took the form of sending in to them a copy of the reporter's transcript of the evidence and that that was done by stipulations, is misleading, because our side of the stipulation simply stipulated that we had no objection to the jury reading the evidence that they had already heard but that we coupled our willingness with a request that the Court send its judicial knowledge of a ceiling of 25% to the jury along with the transcript.

Pages 49 and 50: Appellee seeks to overcome the *Guetzkow* case by a reference to *Edwards Mfg. Co. v. Bradford*, 294 Fed. 176, 182, 185. The latter case favors us, because it rules, at page 184, that what is a reasonable or unreasonable profit is "a question of law", which is exactly what we contend; and it held that in a sale at 10¢, a profit of 1¢ on 9¢ or less than 12%, was as a matter of law not an unreasonable profit. From the facts it appeared that on September 6, 1917, the plaintiff took a short position by contracting to sell 300 tons of sheet steel at 10¢ a pound for future delivery. (294 Fed. at 177.) At the time of the short sale the market price of the steel was 9¢ per pound. On November 5th, almost a month later, the United States Government fixed the price of this steel at 6¢ per pound. The purchase by the plaintiff from the defendant was made November 22nd at the ceiling price of 6¢ per pound. The argument was that under the *Guetzkow* case the profit should be calculated as an ordinary one based

upon a cost of 6¢ and a sale at 10¢. The ruling of the Court was that 3¢ was attributable to the hazard plaintiff had taken in taking the short position and that the true method of applying the *Guetzkow* case was to treat the profit as 1¢ on 9¢ or less than 12%, which was reasonable as a question of *law*.

Pages 51 to 53: Appellee argues that the language, "the buyer must make proof" appearing in Defense Request No. 31, given at R. 521, is equivalent to an instruction to the jury that the burden of proof was on the plaintiff. The instruction goes no further than to indicate that the buyer must introduce some evidence, but it is utterly silent upon the question of burden of proof. At its page 53 appellee makes a misstatement that we did not request an instruction on the burden of proof "until the day after all the requests had been discussed" and therefore the request was too late. The session of the Court below at which the instructions were settled was held on March 20, R. 470. The Court announced that it would "now take up the matter of instructions under Rule 51" FRCP. It stated: "I am giving defendants' Request No. 36", R. 477. Overnight, there was a change of mind and on March 21, R. 505, the Court made the following announcements in the course of the following colloquy, R. 505-506:

"The Court. Referring to the defense request No. 36, yesterday I stated that I expected to give that instruction. I now advise counsel that I will give the instruction, but I shall delete therefrom the following: 'And the burden of proof is on the plaintiff.' That is the last clause or phrase in the instruction. You may have an exception to that, Mr. Naus, of course.

Mr. Naus. No, I don't think so, your Honor, because I take it in your stock instruction you will deal

with the burden of proof, so I take no exception to that deletion.

The Court. Very well."

On the previous day, near the beginning of the settlement of instructions the Court had stated, R. 472:

"These instructions will be followed by what I call our stock instructions. Those instructions are the instructions usually given by the court in civil cases with which both sides are familiar."

It is self-evident that an instruction upon the burden of proof is one of "the instructions usually given by the court in civil cases with which both sides are familiar" and hence when on the following day we announced that we would take no exception to the deletion from our Request No. 36 of the matter relating to the burden of proof, because we understood that the Court would cover that by its "stock instruction", we received the assent of the Court below.

Page 54: Appellee argues with respect to the failure to instruct on the burden of proof that we "took no exception". Rule 46 FRCP rules that it was sufficient for us to have made known to the Court the action that we wished the Court to take on the matter of instructing on the burden of proof. We made it clear that we wanted an instruction on it and the Court gave no instruction on it.

Pages 54 to 56: Appellee confuses two utterly different things: (1) the determination of "net profit" from the standpoint of Hermann as a claimant against appellee, as a basis of amount on which to calculate *his* 50%, and (2) the determination of *appellee's* net profit after appellee had paid its salesman-employe Hermann. This is not a suit by Hermann against appellee; it is a suit by appellee

against appellants, a suit for appellee's gain prevented. To determine that gain, one must look at what appellee would retain or have left if it had paid out a royalty or selling commission of 50%. The case of *Russ v. Tuttle*, 158 Cal. 226, cited at appellee's page 55, does not meet the point. It was not a suit for gain prevented, i.e., not a suit for lost profits. It was simply a suit for damages in the form of excess of market value over contract price, in which one of the joint owners of the contract had not been named as a co-plaintiff and hence there was a defect of parties plaintiff, which might have been reached by demurrer or answer, but as to which no objection was taken in the pleading. At bar, appellee claims as an assignee of the whole contract with appellants, and Hermann becomes merely an employe or salesman of the assignee. The five cases cited at appellee's page 56 at the foot of its argument heading VI, are simply cases of an employee suing an employer for a percentage of net profits and obviously in that context, the term "net profits" would be used as meaning before deduction of the percentage. However, at bar the suit is not one by an employe to be awarded a percentage of net profits but the question here is simply, What gain would be retained by or left to appellee, the employer, after deducting the 50% selling commission payable to the salesman?

Pages 56 and 57: They make the unsupported statement that the principle of Defense Request No. 37 (our Opening Brief pages 74 to 77) "does not exist in the law of sales". The "law of sales" is part of the "law of contracts". The "principle" in question is part of the "law of claims of lost profits". In the great multitude of suits for damages for breach of a contract of sale the damages are not measured by profits, measurement by the latter

being a rare exception; and a transaction like the one at bar, wherein both buyer and seller were engaging in something new, is far more rare. Paucity of particular precedent is therefore not surprising. However, the principle is clear and established, with the line of cases led by the Supreme Court of the United States. In 17 C.J., Damages, § 199, and 25 C.J.S., Damages, § 90, the principle is presented as a broad one extending throughout the fields of contract and tort whenever *profits* are claimed by a plaintiff; and in the absence of any local decision the diversity case at bar is ruled by *United States v. Speed*, 8 Wall. (75 U.S.) 77, last two paragraphs. The suggestion at appellee's page 57 that wine prices have not fallen since the expulsion of Germans from Italy and France is false; there has been a heavy fall.

Pages 57 to 59: The vice of the instruction given, their No. 10, is that it assumes that an inability to pay cannot exist unless the plaintiff was "actually insolvent". They assume that if plaintiff had a net worth of, say, one dollar and hence solvent though barely so, *aside* from the wine contract, ergo they had an ability to perform the wine contract independently of the credit obtainable through receipt of the wine or the shipping documents covering it, contrary to Williston's section 881. A plaintiff does not show a readiness and ability to perform by showing the credit he would obtain through performance by the defendant; his ability must be independent, *Brown v. Lee*, 5 Cir., 192 Fed. 817, 821, bottom. To that the Court cited *inter alia Gray v. Smith*, 76 Fed. 525, 534, which states, "But efficient ability is back of, and is essential to, the obligations of the parties, and must actually exist in each independent of the other".

It was incumbent on plaintiff to show ability to perform; "Neither party to a contract can maintain an action for damages for its violation without showing a readiness and ability to comply with his own engagements under the contract", 17 C.J.S. 1232, 13 C.J. 764. At its page 58 appellee seeks to evade its burden by saying that "Defendants raised the supposed inability of the buyer (Fourth Defense, R. 24)". No one but defendants could *raise* it, because issues are not "raised" until answer; but appellee's innuendo of an affirmative *defense* is false, because the failure of the complaint to allege readiness and ability was a fatal defect, and the "fourth defense" was not a confession and avoidance but was simply a pleading aider through an affirmative *traverse* of a missing essential allegation of the complaint. The issue was appellee's ability to perform, and it failed to show ability.

The reference at their page 58 to Calif. Civil Code § 1511 is incomprehensible. The issue is not one of excuse for nonperformance, but of a missing element in a contract claimant's claim.

Dated, San Francisco,
January 15, 1945.

Respectfully submitted,
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(Appendices A and B Follow.)

Appendices

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Appendix A

REPLY TO APPELLEE'S APPENDIX A.

We reply in the sequence of the Roman paging of their Appendix.

(i-ii). They quibble. "Chateau Montelena of California" was a name used by Feldheym, R. 186 and 187. "Chateau Montelena of New York" was a name used by the wife of Hermann, R. 187. In the questions and answers at R. 186 and 187 it is clear that the witness Hermann, in stating the extent of buying of wine by himself and wife prior to the deal with appellants, gave as the only transaction one carload bought from Feldheym (Chateau Montelena of California) by the Hermanns (Chateau Montelena of New York).

(iii). Appellee challenges our statement, "There is no evidence that any orders were taken or sales made under either *list*". They quote from R. 298 Elman's testimony on direct examination about a commitment or order for 1200 cases of wine. However, on cross-examination, it developed that the customer was located in Washington, D. C., not in New York, R. 330, and the witness Elman admitted that he did not "recall" whether that verbal commitment, R. 330, to the Washington customer was before or after the posting or filing or publishing of the wholesale list in New York, R. 332. We therefore repeat: There is no evidence that any orders were taken or sales made under either list.

(iv). We still say that Elman was not an accountant or auditor and that he did not produce any accounts or books.

It follows that his testimony about "six per cent" is necessarily an assumption.

(vii). The references to the witnesses Cholet, Lusinchi and Elman, as to "the state of the wine market" add nothing.

(viii), proof of cost of labels. Appellee treats cost of labels as part of "selling expense" included in sales overhead of six per cent. The cost of labels, however, is obviously a part of the cost of packaged merchandise, not a sales overhead.

(ix). What difference does it make at what time of the year Finlay, Holt & Company milked its subsidiary Park, Benziger & Co.? If it was "at the end of each year", then it is obvious that the preceding year had ended less than a month before the contract was made on January 29, 1943.

Appendix B

NEW YORK ALCOHOLIC BEVERAGE CONTROL LAW, § 101-b.

Section 101-b. Unlawful discriminations prohibited; filing of schedules; schedule listing fund.

1. It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale, and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate the undue stimulation of sales of alcoholic beverages and the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, and other inducements to selected licensees, which contribute to a disorderly distribution of alcoholic beverages, and which are detrimental to the proper regulation of the liquor industry and contrary to the interests of temperance, it is hereby further declared as the policy of the state that the sale of alcoholic beverages should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

2. It shall be unlawful for any person privileged to sell liquors or wines to wholesalers or retailers

(a) to discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing liquor or wine bearing the same brand or trade name and of like age and quality. (b) to grant, directly or

indirectly, any discount, rebate, free goods, allowance or other inducement, except a discount not in excess of two per centum for quantity of liquor, a discount not in excess of five per centum for quantity of wine and a discount not in excess of one per centum for payment on or before ten days from date of shipment.

3. (a) No brand of liquor or wine shall be sold within the state to a wholesaler or retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect.

(b) The schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the bottle and case price to wholesalers, the bottle and case price to retailers, the number of bottles contained in each case, which prices shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any.

(c) The schedule containing the bottle and case price to wholesalers shall be filed by (1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, or (3) with the approval of the authority, by a wholesaler, in the event that the owner of the brand is unable to file a schedule or designate an agent for such purpose.

(d) The schedule containing the bottle and case price to retailers shall be filed by each manufacturer and wholesaler who sells brands of liquors or wines to retailers.

(e) Provided however, nothing contained in this section shall require any manufacturer or wholesaler to list in any schedule to be filed pursuant to this section any item offered for sale to a retailer under a brand which is owned exclusively by one retailer and sold at retail within the state by such retailer.

4. Each such schedule shall be filed on or before the tenth day of each month on a date to be fixed by the authority, and the prices and discounts therein set forth shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. Within ten days after the filing of such schedule the authority shall make them or a composite thereof available for inspection by licenses by filing copies with each local board. Within three business days after such inspection is provided for, a wholesaler may amend his filed schedule for sales to retailers in order to meet lower competing prices and discounts for liquor or wine of the same brand or trade name, and of like age and quality filed pursuant to this section by any licensee selling such brand, provided such amended prices are not lower and discounts are not greater than those to be met. Any amended schedule so filed shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. No brand of liquor or wine shall be sold except at the price then in effect unless written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. All schedules filed shall be subject to public inspection, from the time that they are required to be made available for inspection

by licensees, and shall not be considered confidential. Each manufacturer and wholesaler shall retain in his licensed premises for inspection by licensees a copy of his filed schedules as then in effect. The liquor authority may make such rules as shall be appropriate to carry out the purpose of this section.

5. For the purpose of raising the moneys necessary to defray the expenses incurred in the administration of this section, on or before the tenth day after this act becomes a law, there shall be paid to the liquor authority by each manufacturer and wholesaler licensed under this chapter to sell to retailers liquors and/or wines, a sum equivalent to ten per centum of the annual license fee prescribed by this chapter for each such licensee. A like sum shall be paid by each person hereafter applying for any such license or the renewal of any such license, and such sum shall accompany the application and the license fee prescribed by this chapter for such license or renewal as the case may be. In the event that any other law requires the payment of a fee by any such licensee or applicant as set forth in this section for schedule listing, then and in such event the total fee imposed by this section and such other law or laws on each such licensee shall not exceed in the aggregate a sum equivalent to ten per centum of the annual license fee prescribed by this chapter for such license. Added L. 1942, c. 899, Sec. 1.